Toffoloni v. LFP Publishing Group, LLC Doc. 38

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI,)
as Administrator and Personal)
Representative of the ESTATE)
OF NANCY E. BENOIT,)
) CASE NO. 1:08-cv-00421-TWT
Plaintiff,)
)
vs.)
)
LFP PUBLISHING GROUP, LLC,)
d/b/a Hustler Magazine, et al,)
)
Defendant.)

DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFF'S
MOTION FOR AN AWARD OF ATTORNEY FEES

NOW COMES Defendant LFP Publishing Group, LLC, d/b/a Hustler Magazine, et al. ("LFP") and hereby respectfully submits this Brief in Opposition to Plaintiff's Motion for an Award of Attorney Fees Pursuant to Rule 11 of the Federal Rules of Civil Procedure and the Court's Inherent Powers, D.I. 31.

INTRODUCTION AND STATEMENT OF THE CASE

Plaintiff does not even attempt to satisfy the procedural prerequisites to pursuing a motion for fees under Fed. R. Civ. P. 11, and accordingly her motion is fatally flawed and must be denied.

Dockets.Justia.com

But even had Plaintiff complied with the Rule 11 notice and "safe harbor" provisions, because LFP brought its motion to stay in good faith, and for an entirely proper (and in fact logical) purpose, her motion is misplaced and on the merits should be denied.

As the Court is aware, the Eleventh Circuit Court of Appeals reversed this Court's Rule 12(b)(6) dismissal of Plaintiff's Complaint and remanded the case for further proceedings. Before the mandate from the Eleventh Circuit issued and was adopted by this Court, which effectively re-started the trial court proceedings, LFP counsel informed Plaintiff's counsel of LFP's intent to seek certiorari to the United States Supreme Court and asked if Plaintiff would consent to a joint motion to stay the proceedings while that effort to appeal the Eleventh Circuit's decision is ongoing. Plaintiff refused the overture on the spot. Accordingly, once the Eleventh Circuit's mandate issued and was adopted by this Court, LFP filed its Notice of Defendant's Intent to Petition Supreme Court of the United States for Writ of Certiorari and Motion to Stay Proceedings asking this Court for the relief for which Plaintiff refused her consent. (D.I. 29 and 29.1.)

The reason for LFP's Motion to Stay is simple: the Eleventh Circuit's decision to reverse this Court's order dismissing Plaintiff's Complaint calls into question a century of Constitutional jurisprudence on which all media -- whether adult, alternative, mainstream or other -- necessarily rely to ensure the freedom of the press, and presents a compelling case for the grant of certiorari by the U.S. Supreme Court. Under these circumstances, where the issues to be presented to the U.S. Supreme Court for review are of paramount Constitutional importance and are reasonably likely to enjoy review by the highest court, fairness to the parties and judicial economy support a brief stay of the trial court proceedings while the petition the United States Supreme Court for a writ of certiorari is pending. There could be no harm to either party, financial or otherwise, resulting from the requested stay; and there can be no legitimate dispute that there will be substantial and unrecoverable litigation costs to the parties if the case is permitted to proceed through discovery, pre-trial motions and trial while LFP's petition for certiorari is pending.

Plaintiff's argument notwithstanding, LFP's motion was not brought to harass Plaintiff, to cause her unnecessary delay, to increase the cost to Plaintiff of this litigation, or without a basis in federal law. To the contrary, LFP brought its motion to stay in accordance with the process and criteria established by the federal courts for seeking such a stay, and for the sole purpose of saving both parties the substantial costs of litigating this case on the merits while the U.S. Supreme Court decides whether to review and clarify the important issues of

Constitutional law at stake. For these reasons Plaintiff's motion for an award of attorneys' fees is unwarranted, and should be denied.

ARGUMENT AND CITATION TO AUTHORITY

A. Plaintiff's "Rule 11 Motion" Does Not Even Comply With Rule 11

Simply put, Plaintiff has failed to satisfy the procedural prerequisites for filing a motion pursuant to Fed. R. Civ. P. Rule 11, and therefore the motion must fail. Rule 11 requires that, before any motion for sanctions under the rule may be filed, a party desiring to serve a motion for sanctions must first serve the contemplated motion upon the offending party and give said party 21 days to withdraw or abandon "the challenged paper . . . [or] contention." Fed. R. Civ. P. 11(c). The Advisory Committee Notes for Rule 11 describe the purpose of this 21-day window:

> These provisions are intended to provide a type of "safe harbor" against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation. Under the former rule, parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11; under the revision, the timely withdrawal of a contention will protect a party against a motion for sanctions.

Fed. R. Civ. P. 11(a) advisory committee's note.

Failure to comply with the Rule 11 "safe harbor" provisions are a procedural bar to relief under the rule. *See Bartronics, Inc. v. Power-One, Inc.*, 245 F.R.D. 532, 538 (S.D. Ala. 2007) (denying motion because plaintiff "failed to comply with the unambiguous requirement of advance service and 21-days notice before filing said request with the Court."); *Mitchell v. Osceola Farms Co.*, 408 F. Supp. 2d 1275, 1280 (S.D. Fla. 2005) ("Because Defendant filed its motion with the court contemporaneously with service to Plaintiffs, the Court must deny Defendant's motion."); *Johnson v. Barnes*, 283 F.Supp.2d 1297, 1301 n.2 (S.D. Ga. 2003) ("[w]here a party opponent files a Rule 11 motion, Rule 11(c)(1)(A) allows an offending party a 21-day 'safe harbor' within which to correct or withdraw his Rule 11 violative filing and thus avoid Rule 11 sanctions.").

Plaintiff filed her motion with the Court and contemporaneously served it upon LFP via the Court's CM/ECF electronic filing system. In other words, Plaintiff did not provide LFP with the mandatory 21-day "safe harbor" period. The motion must therefore be denied.

B. The Motion To Stay Was Brought Pursuant To Established Procedure And In Good Faith

Plaintiff's request for sanctions against LFP for filing its motion to stay is based on her erroneous assertions that "federal case law does not support [a] request for a stay," Pl. Mot. at ¶ 4, and the motion "lacks any proper purpose, and was filed to harass the Plaintiff, to attempt to cause unnecessary delay, and to needlessly increase the cost to Plaintiff of this litigation." *Id.* None of these assertions has merit.

First, this Court indisputably has the inherent authority to issue a stay of proceedings whenever necessary to manage its own docket to enable an efficient pursuit of justice while balancing the interests of the parties. *See Landis v. North American Co.*, 299 U.S. 248, 254-55, 57 S. Ct. 163, 166 (1936) ("the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.")

Second, federal case law not only makes clear that the trial courts are authorized to stay proceedings while a petition for certiorari is pending, but also explains the criteria the trial courts should consider when deciding whether to grant such stays. *See U.S. v. Mandycz*, 321 F. Supp. 2d 862, 863-64 (E.D. Mich. 2004); *see also U.S. v. Keystone Sanitation Co., Inc.*, 903 F. Supp. 803, 817 (M.D. Pa. 1995) (citing *Barnes v. E-Systems, Inc.*, 501 U.S. 1301, 1302, 112 S. Ct. 1, 2 (1991)). LFP's Motion to Stay seeks relief based upon and was properly brought in accordance with this settled federal law.

Finally, there is no basis for Plaintiff's attack on LFP's motives for seeking the stay. The purpose of LFP's Motion to Stay is plain: to avoid the irreparable harm that both parties would suffer should they have to litigate the merits of this case while LFP's petition, and the subsequent appeal on the merits, is pending. The motion to stay does not seek to harass, prejudice, or injure Plaintiff in any way: these costs would be incurred by both parties. That is why LFP sought Plaintiff's consent to a stay before seeking such relief unilaterally.

Plaintiff may feel strongly that LFP's appeal to the U.S. Supreme Court is destined to fail, and is therefore unwarranted, but as evidenced by the conflict between this Court's analysis of the Constitutional rights implicated by Plaintiff's Complaint and the decision reached by the Eleventh Circuit on appeal, learned federal judges disagree on whether Plaintiff's claims are barred by the First Amendment. Given the important interests at stake, including the editorial boundaries applicable not only to *Hustler* Magazine but all publishers, LFP must seek an appeal to the U.S. Supreme Court.

A stay of proceedings while the U.S. Supreme Court considers LFP's petition for certiorari is logical and sensible; it is also best for the parties and, in the interests of judicial economy, best for this Court as well. LFP should not be sanctioned for seeking such sensible relief.

CONCLUSION

For the reasons asserted above, LFP respectfully asks the Court to deny Plaintiff's Rule 11 Motion.

Respectfully submitted this 1st day of October 2009.

/s/ S. Derek Bauer
James C. Rawls
Georgia Bar No. 596050
Barry J. Armstrong
Georgia Bar No. 022055
S. Derek Bauer
Georgia Bar No. 042537

McKENNA LONG & ALDRIDGE LLP
303 Peachtree Street, NE, Suite 5300
Atlanta, Georgia 30308
(404) 527-4000
(404) 527-4198 (facsimile)

Attorneys for LFP Publishing Group, LLC, d/b/a Hustler Magazine, et al.

CERTIFICATION OF COUNSEL

Pursuant to N.D. Ga. Local Rule 7.1D, I hereby certify that this document is submitted in Times New Roman 14 point type as required by N.D. Ga. Local Rule 5.1B.

/s/ S. Derek Bauer
S. Derek Bauer
Georgia Bar No. 042537

CERTIFICATE OF SERVICE

This is to certify that I have this day filed the within and foregoing **Brief in Opposition to Motion for an Award of Attorney Fees** via the CM/ECF system which will automatically send notification to Plaintiff's attorney of record, who is a participant in the CM/ECF system.

Respectfully submitted this 1st day of October 2009.

/s/ S. Derek. Bauer

S. Derek Bauer, Esq.
Georgia Bar No. 042537
McKENNA LONG & ALDRIDGE LLP
303 Peachtree Street, NE
Suite 5300
Atlanta, GA 30308
Telephone: (404) 527-4000
Facsimile: (404) 527-4198

Attorneys for Defendant-Appellee
LFP PUBLISHING GROUP, LLC

ATLANTA:5176190.1